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BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Advanced Television Systems	)	
and Their Impact upon the	)	MM Docket No. 87-268
Existing Television Broadcast	)	
Service	)	

To: The Commission

REPLY COMMENTS OF WEIGEL BROADCASTING CO.

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SUMMARY

There are many policy issues in this proceeding, but only one central legal issue -- whether low power television service may be sacrificed to achieve DTV conversion, as is currently proposed by the Commission. Unlike the policy issues, the legal issue involving low power television must be answered based on past legal precedent, precedent established largely under Section 307(b) of the Communications Act.

If one dusts off the pages of the law and reviews the decided cases under Section 307(b), two central values are apparent: The value of localism and the value of existing broadcast service. A DTV conversion plan that would require the widespread destruction of established, locally-responsive low power broadcast service would violate both of these basic Section 307(b) values. To justify such a plan, the cases say, compelling evidence of offsetting broadcast service gains would be necessary. The record in this proceeding contains no such evidence. The record in this proceeding states that whatever new service may arise from DTV conversion will not even be required to be *broadcast* service, much less a broadcast service that provides locally-responsive, public interest programming of the type necessary to further the goals of Section 307(b).

Based on the record in this proceeding, the current proposal to destroy valuable existing low power broadcast service is contrary to Section 307(b) and therefore unlawful. There are, moreover, measures the Commission can take, and technical rules the Commission can adopt, that will obviate any need to make a choice between DTV conversion and low power television. Because the benefits thought likely to result from DTV conversion can be achieved *without* destroying valuable existing low power broadcast service, it is quite clear that Section 307(b) could never sanction a DTV conversion plan that would cause such needless harm to valuable existing broadcast service.

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Weigel Broadcasting Co. ("Weigel") submits these reply comments in response to the Commission's *Sixth Further Notice of Proposed Rule Making*, FCC 96-268 (rel. Aug. 14, 1996).

Weigel is the licensee of seven low power television stations serving Chicago and Rockford, Illinois; Milwaukee, Wisconsin; and South Bend, Indiana. Under the Commission's current plan for DTV conversion, all seven of Weigel's low power stations would be forced off the air.

Weigel's initial comments in this proceeding described in detail the valuable broadcast service these low power stations provide to their local communities. These reply comments will explain why, in Weigel's view, destruction of such valuable local broadcast service would violate Section 307(b) of the Communications Act.

Destruction of the local broadcast service provided by Weigel's low power stations and others like them is not necessary to accomplish DTV conversion. But put aside that issue for the moment. Assume initially, and solely for the sake of argument, than *any* viable DTV conversion plan for the markets Weigel serves would require the destruction of Weigel's stations. Even in this

extreme, purely hypothetical case, a serious question would exist regarding whether Section 307(b) would permit the Commission to choose future DTV service over the existing local service Weigel's stations now provide.

Section 307(b) Favors Existing Broadcast Service that Responds to Local Needs

Broadcast allocations policy is governed primarily by Section 307(b). The Commission's actions in this allocations proceeding must square with Section 307(b). If they do not, they are unlawful.

Two central principles of Section 307(b) are the value of localism and the value of existing broadcast service. The Commission's current DTV conversion proposal would violate both principles by destroying existing, locally-responsive broadcast service such as that provided by Weigel's low power stations. Section 307(b) would require a compelling justification for violating these basic principles of broadcast allocations, and the record in this proceeding does not contain one.

The Value of Localism

Section 307(b)'s central dictate is that broadcast allocations policy must pursue the value of localism:

> [T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same. [*47 U.S.C. §307(b).*]
>
> Section 307(b) . . . empowers the Commission to allow licenses so as to provide a fair distribution among communities. Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece. [*FCC v. Allentown Broadcasting*

Corp., 349 U.S. 358, 362 (1955).][1/]

The value Section 307(b) attributes to local allocation of broadcast outlets is primarily a means to achieve a greater end: Local outlets are prized for their unique ability to satisfy what *Allentown* termed a community's "local needs." And local broadcast stations satisfy local needs, of course, through their programming:

> [I]n a comparative consideration [of conflicting plans for broadcast service], it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. [*Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 359 (D.C. Cir. 1949).]

The ultimate value of localism under Section 307(b) is thus the value that inheres in a certain kind of programming -- programming *that responds to local needs*:

> In requiring a fair and equitable distribution of service, Section 307(b) encompasses not only the reception of an adequate signal but also community needs for programs of local interest and importance and for organs of local self-expression. [*Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 207 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).]
>
> It is generally recognized that programming is of the essence of radio service. Section 307(b) of the Communications Act requires the Commission to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same." Under

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[1/] *See also, e.g., North Texas Media, Inc. v. FCC*, 778 F.2d 28, 33 (D.C. Cir. 1985) (Section 307(b) seeks to provide "service of local origin to as many communities as possible"); *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050-51 (D.C. Cir. 1977) ("Local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement preexisting local operations."); *cf. NAB v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984) (Section 307(b)'s strong preference for localism in broadcast allocations does not bar nationwide DBS authorizations, so long as terrestrial broadcast allocations policy continues to satisfy the statutory requirement of localism in broadcast allocations).

> this section the Commission has consistently licensed stations with the end objective of either providing new or additional programming service *to* a community, area or state, or of providing a new or additional outlet for broadcasting *from* a community, area or state. Implicit in the former alternative is increased radio reception; implicit in the latter alternative is increased radio transmission and, in this connection, appropriate attention to local live programming is required. [*En Banc Programming Inquiry*, 20 Rad. Reg. (P&F) 1901, 1910 (1960) (emphasis in original).]

Locally-originated programming is only the most obvious example of those kinds of programming that respond to local needs and thus promote Section 307(b)'s ultimate objective. Other types of programing have also long been recognized as furthering this central goal of Section 307(b). At the polar extreme from locally-produced programming, Section 307(b) also favors the availability of national television network programming, because such programming meets local needs for news, information and other programming that is national in orientation and scope:

> [Among the] important qualitative public interest goals . . . in matters involving distribution (or redistribution) of broadcast service as part of the agency's larger implementation of Section 307(b) . . . [is the] provision of *network television service*. [*Elba Development Corp.*, 96 F.C.C.2d 376, 379 (Rev. Bd. 1984) (emphasis in original) (subsequent history omitted).]
>
> [The] criteria which we have traditionally considered in allocations-related matters . . . . [include] first network service; [and] choice of networks. [*WFMY Television Corp.*, 59 F.C.C.2d 1010, 1017 (1976).][2/]

Analytically, Section 307(b) favors *all* of the recognized types of programming that respond to local needs, because satisfaction of local needs is the primary reason Section 307(b) was enacted.

2/ *See also, e.g., Pennsylvania State University v. FCC*, 304 F.2d 956 (D.C. Cir. 1962) (*per curiam*) (affirming preference for third national network affiliate over first local noncommercial service); *Central Alabama Broadcasters, Inc.*, 88 F.C.C.2d 1501, 1534 (Rev. Bd. 1982) (subsequent history omitted) (awarding preference for provision of new television network service).

In addition to local and network programming, locally-responsive programming has been determined to include news, public affairs, children's educational, minority-oriented and other traditional forms of public interest programming.[3/] An allocations policy cannot ignore its effect on the availability of such locally-responsive programming, because to do so would depart from the central purpose of Section 307(b), and thus also from fidelity to the Act:

> Present and proposed programs would seem to be an essential element in testing comparative community needs from the standpoints of both the receivers and the broadcasters. [*Easton Pub. Co. v. FCC*, 175 F.2d 344, 348-49 (D.C. Cir. 1949).]
>
> If the requirements of the public interest are to be satisfied, the Commission must consider not only the public benefit from the operation of the new station, but also any public loss which it might occasion. Only by such a balancing can the Commission reach a legally valid conclusion on the ultimate question of the public interest.
>
> * * *
>
> By refusing to base its decision upon a 'comparative consideration of [the existing and proposed new service],' the Commission effectively . . . overlooked one factor which is inherent in the complex of the public interest. Suppose, for example, that [the existing station] devoted a large portion of its broadcasting efforts to meeting the particular needs of the people in the interference area, that many of its programs originated there, and that it was the only station which was especially solicitous of that particular area. Obviously in such a case, the listeners affected might well need the station threatened with displacement more than they would if it did not program especially

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3/ *E.g., Broadcast Renewal Policies*, 66 F.C.C.2d 419, 430 (1977), *aff'd, National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978); *En Banc Programming Inquiry*, 20 Rad. Reg. (P&F) at 1913. The Act's overarching "public interest, convenience and necessity" standard might be thought the ultimate source of such doctrinal programming preferences, *see, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943), but that standard alone is too broad to import much beyond a vague preference for "the public good," and so more focused and explicit statutory signposts are needed to provide objective policy content and direction. Section 307(b)'s preference for localism is such a signpost.

> for them and if other stations, including the proposed one, did. . . . [W]here 164,300 people are threatened with loss of a broadcast service, as here, the Commission could not regard as irrelevant what . . . the public interest command[s] -- a determination as to the comparative merits of the two stations in the area of interference.
>
> * * *
>
> Nor does it suffice to say that since [the new station's] signal will replace [that of the existing station] for the interference area, there is no 'loss of service' . . . . We do not see how the Commission can adopt qualitative criteria of need to justify [the new station's] entry . . . and then use purely quantitative criteria of coverage to determine 'need for the services . . . lost by reason of such interference.' This last is as much a composite of program content, facilities and ties to the area served as is the former. [*Democrat Printing Co. v. FCC*, 202 F.2d 298, 301 (D.C. Cir. 1952).][4/]

The Value of Existing Broadcast Service

Section 307(b) also embodies a strong preference for preserving the value of existing broadcast service. Section 307(b) prefers existing service because members of the public "become accustomed [to] and come to rely upon" such service. *Daytime Skywave*, 27 F.C.C. 587, 596, *mod. in other respects*, 27 F.C.C. 690 (1959). For this reason, few principles are more central to Section 307(b) than its presumption that existing broadcast service should be preserved:

> [That] eliminating service to some areas and some people and down-grading service to those who will continue to receive the signal is not in the public interest is axiomatic. [*Hall v. FCC*, 237 F.2d 567, 572 (D.C. Cir. 1956).]
>
> [A] fundamental principle . . . basic to the Commission's approach to its task . . . may be stated as follows: any deprivation or degradation

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4/ *See also, e.g., New York Municipal Broadcasting System*, 91 F.C.C.2d 635, 643 (1982) (discussing Section 307(b) standards governing when local needs for specific types of program service justify permitting harmful interference to other stations), *aff'd, New York Municipal Broadcasting System v. FCC*, 744 F.2d 827 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Iowa State University of Science and Technology*, 19 F.C.C.2d 36, 46 (1969) (same).

> of television service to any group of people is prima facie not in the public interest and can be justified only by countervailing public interest factors sufficient to offset that deprivation or degradation. [*Central Coast Television*, 14 F.C.C.2d 985, 986 (Rev. Bd. 1968) (subsequent history omitted).]
>
> Once in operation, a station assumes an obligation to maintain service to its viewing audience and the withdrawal or downgrading of existing service is justifiable only if offsetting factors are shown. [*Triangle Publications, Inc.*, 37 F.C.C. 307, 313 (1964).]
>
> [Service] losses are prima facie inconsistent with the public interest . . . [and to justify them] a strong showing of other offsetting public interest considerations must be made. [*Carolina Broadcasting Co.*, 18 F.C.C.2d 482, 484 (1969).]

Existing service is preferred not merely to equivalent proposed new service, but often also to proposed new service that would advance central Section 307(b) objectives, such as the value of localism. *E.g., Greenwich Broadcasting Corp. v. FCC*, 294 F.2d 913, 914-15 (D.C. Cir. 1961) (proposed new first local transmission service rejected where interference to existing service would result). In particular, the destruction of existing service is *never* justified by the mere fact that service gains would exceed, even greatly, service losses:

> It is apparent that the Commission has started with the premise that more service to more people -- even to a group already well served -- is prima facie desirable, and that it must then consider whether this advantage is offset by the negative factor of loss of service by others. Our *Hall* opinion expressed the opposite approach -- that deprivation of service to any group was undesirable, and to be justified only by offsetting factors. . . . The difference is not merely one of words. It is basic to the Commission's approach to its task. [*Television Corp. of Michigan, Inc. v. FCC*, 294 F.2d 730, 732 (D.C. Cir. 1961).]
>
> [I]t is well established that the mere fact that total gains exceed losses does not, standing alone, constitute an affirmative factor offsetting those losses. [*KTOV, Inc.*, 63 F.C.C.2d 770, 774 (Rev. Bd. 1977), *rev.*

denied, FCC 78-164 (rel. Mar. 1, 1978).][5/]

Under Section 307(b), the number of persons served and the quantity of service offered is not the public interest test. The test is whether the *actual needs* of the affected local community will be served:

> A mere finding of net gains in service is insufficient . . . . A comparison of the needs of those who would gain service and those who would lose it must first be made. [*John Lamar Hill*, 70 F.C.C.2d 153, 159 (Rev. Bd. 1978) (subsequent history omitted).]

This comparison of needs for broadcast service must begin where Section 307(b) itself begins, with the value of localism; and it must end where Section 307(b) ends, with the ultimate goal the value of localism seeks to achieve -- the availability of *programming that responds to local needs. E.g., FCC v. Allentown Broadcasting Corp., supra; Pinellas Broadcasting Co. v. FCC, supra.* The comparison must "take cognizance of every feature of existing service," *Easton Pub. Co. v. FCC*, 175 F.2d at 349, including above all the public interest feature that is of greatest interest to the public -- the *programming* provided by the existing service. *Pinellas Broadcasting Co. v. FCC, supra; Democrat Printing Co. v. FCC, supra; Easton Pub. Co. v. FCC, supra; Johnston Broadcasting Co. v. FCC, supra.*

5/ Many decisions illustrating this principle have been cited in the November 22, 1996 Comments of the Broadcasters Caucus at 28-30. To cite only a few examples here, past decisions have ruled that a loss of existing service to 89,000 persons is not justified by a gain in proposed service to 385,000 persons, *West Michigan Telecasters, Inc. v. FCC*, 460 F.2d 883 (D.C. Cir. 1972); that a loss of existing service to 5,000 persons is not justified by a gain in proposed service to 194,000 persons, *KTOV, Inc.*, 57 Rad. Reg. (P&F) 2d 648 (1984); that a loss of existing service to 64,000 persons is not justified by a gain in proposed service to 570,000 persons, *Cosmos Broadcasting Corp.*, 5 F.C.C.2d 690 (1966); and that a loss of existing service to 1,700 persons is not justified by a gain in proposed service to over 400,000 persons, *WLCY-TV, Inc.*, 16 F.C.C.2d 506 (Rev. Bd. 1969), *rev. denied*, 25 F.C.C.2d 832 (1970), *recon. denied*, 28 F.C.C.2d 353 (1971).

The Section 307(b) Determination in this Proceeding

The record in this proceeding demonstrates that Weigel's low power stations are not alone in providing a local low power broadcast service that directly furthers the ultimate objective of Section 307(b).[6/] The service Weigel's stations provide is a useful example, however, of the kinds of valuable existing low power service the Commission must justify destroying to validate its current DTV proposal under Section 307(b).

The kinds of programming deemed particularly responsive to local needs -- and hence especially to be valued under Section 307(b) -- have remained, despite some changes, remarkably constant over time. Thirty-seven years ago, they were described as follows:

> The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as . . . recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming. [*En Banc Programming Inquiry*, 20 Rad. Reg. (P&F) at 1913.][7/]

6/ See, *e.g.*, November 22, 1996 Comments of the Community Broadcasters Association at 5-7; November 25, 1996 Comments of Abacus Television at 3; November 19, 1996 Comments of Innovative Technologies, Inc.; November 22, 1996 Comments of Media-Com Television, Inc.; November 22, 1996 Comments of National Translator Association; November 22, 1996 Comments of Tanana Valley Television Co.; November 22, 1996 Supplemental Comments of Trinity Broadcasting Network; November 20, 1996 Reply Comments of W25AW (WZBN), Trenton, New Jersey.

7/ Beyond their mere presence as two categories of a "balanced" program service, entertainment and (to a lesser degree) sports programming were never particularly emphasized by the Commission, and they are largely disregarded today as public interest factors. *E.g., FCC v. WNCN Listeners*

(footnote continued . . .)

A more recent statement, from 1977, is similar:

> Our . . . practice . . . has been to examine all elements of the licensee's past performance that bear upon its service in the public interest. . . . Our precedent . . . reveals some of the issues that we have considered particularly relevant. In general, of course, the licensee's responsiveness to the ascertained problems and needs of its community, including minority interests and concerns, remains central. . . . [Also relevant is the licensee's record in the areas of] news, public affairs and local programming, as well as cultural, educational, foreign language, prime time, children's, agricultural and religious programming. [*Broadcast Renewal Policies*, 66 F.C.C.2d at 419.]

Also similar is the Commission's exposition (during the *Cowles* adjudication) of the programming basis for the broadcast renewal expectancy:

> The Commission . . . found impressive in Cowles' past record . . . numerous programs demonstrating Cowles' "local community orientation" and "responsive[ness] to community needs," . . . [and considered] the percentage of Cowles' programming devoted to news, public affairs, and local topics. [*Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 508 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).][8/]

(footnote 7 continued . . .)
Guild, 450 U.S. 582 (1981); *Seattle Public Schools*, 4 F.C.C. Rcd. 625, 630 (Rev. Bd. 1989). Editorialization and agricultural programming have not been separately emphasized in recent years, but are subsumed within the more generalized category of nonentertainment informational programming. The other types of programming recognized as locally-responsive in 1960 would probably be recognized by the Commission in essentially the same fashion today.

8/ *See also, e.g., Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 398, *recon. denied*, 1 F.C.C.2d 918 (1965) ("We are interested in records which . . . show[] . . . unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs.").

Although comparative renewal proceedings were eliminated by Section 204(a)(1) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (adding a new Subsection 309(k) to the Communications Act of 1934, 47 U.S.C. §309(k)), the 1996 Act states that a license
(footnote continued . . .)

Add to these statements the recognized Section 307(b) preference for making major national television network programming available to communities that are without it (see page 4, *supra)*, and one has, more or less, the full spectrum of accepted types of locally-responsive programming under Section 307(b). Now consider the following summary of the programming currently provided by Weigel's low power stations:

- In Chicago, W23AT provides thirty-five hours of live, locally-produced business and general news and public affairs interview programming per week.

- In Rockford and South Bend, W12BK and W33AR provide seventeen and one-half hours of live business and general news and public affairs interview programming per week.

- In Milwaukee, W46AR provides the only Spanish language broadcast service available to the approximately 100,000 Hispanics of the nation's thirty-first market (Univision Network programming, broadcast 24 hours per day, plus additional locally-produced Spanish language public service programming).

- In Chicago and Milwaukee, W23AT and W65BT provide approximately eighty-two hours of ethnic and minority programming per week, broadcast in over fifteen languages, to serve the needs of over two million members of roughly twenty discrete ethnic and minority groups (a majority of this programming is locally-produced, and a substantial percentage consists of news, public affairs, children's instructional and other nonentertainment programming).

- In Chicago and Milwaukee, W23AT and W65BT provide a locally-produced half-hour children's educational program developed in cooperation with the Chicago Board of Education and aired live each weekday.

(footnote 8 continued . . .)
renewal may be granted only if "the station has served the public interest, convenience, and necessity," 47 U.S.C. §309(k)(1)(A). The Commission has indicated it will apply this requirement in accordance with "existing policy statements and case law." *Order*, 11 F.C.C. Rcd. 6363, 6364 (1996).

- In South Bend, WBND-LP and W69BT provide the only ABC Network programming available in the nation's eighty-fifth market, including a full line-up of ABC news, public affairs and other public interest programming.

- In South Bend, WBND-LP and W69BT provide the only United Paramount Network programming available in the nation's eighty-fifth market. [9/]

This kind of programming service is *exactly* what the Commission praised in the 1960 *En Banc Programming Inquiry*, and praised again in the 1977 *Broadcast Renewal Policy Statement*, and praised again in the 1980s in the *Cowles* proceeding, and has also praised in essentially every other consideration of the subject that has occurred, before or since. One can go down the list contained in any of these statements and put a "check mark" by every item -- "yes, Weigel's low power stations provide that type of public interest programming too to their local communities."

These low power stations provide locally produced programming -- a great deal of it. They provide large amounts of news and public affairs, much of it locally produced and much of it aired live. They provide large amounts of minority, ethnic and foreign language programming, much of it news and public affairs, and much of it locally-produced. They also provide locally-produced religious programming; locally-produced children's educational programming; and major national television network programming that would not otherwise be available to local viewers. It is all there, even extensive market reports, plus, of course, sports and entertainment (but sports and

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[9/] For a more detailed description of the public service provided by Weigel's low power stations, including testimonials to the value of that service by the Mayor of Chicago, the Mayor of Milwaukee, the Mayor of South Bend, Members of the United States Congress and many other prominent government, minority, business and civic leaders in the communities served by Weigel's stations, see the November 27, 1996 Comments of Weigel Broadcasting Co. in MM Docket No. 87-268.

entertainment of a public interest stripe -- because directed to minorities and ethnic groups in their native languages, or because provided by national networks in areas where it would otherwise be unavailable). One could scarcely imagine a more perfect example of broadcast service that advances Section 307(b)'s central objective -- programming that responds to local needs.

As against this, consider what would be gained if this model of locally-responsive broadcast service were destroyed by the current plan for DTV conversion. There would be more channels perhaps (perhaps *not*, there is no way to know), but any increased number of channels would be concentrated in fewer hands -- those of the full power licensees, with low power licensees frozen out. Moreover, there is no telling *what* would be on the new DTV channels. There is certainly no record in this proceeding to indicate what type of service DTV will provide. Indeed, the Commission's DTV rules *would not even require DTV stations to use their increased channel capacity to provide broadcast programming.* The new DTV service to which low power broadcast service would be sacrificed could end up consisting primarily of *common carrier telephone* service, or *enhanced data* service, or *subscription-only video* service. Whatever economic value such services might be thought to provide, they possess *no Section 307(b) value*. They do not advance by so much as an inch any goal of broadcast allocations policy embodied in Section 307(b) of the Communications Act.

From this it follows that the Commission cannot possibly make a sustainable finding in this proceeding that creation of DTV service would justify, under Section 307(b), the destruction of existing local broadcast service such as that provided by Weigel's low power stations.

The "Secondary" Status of Low Power Television

It might possibly be thought that destruction of existing low power broadcast service is unimportant, because such service was classified at its inception as a "secondary" service -- and thus

was branded at birth as a sort of "second class" broadcast citizen. But the policies of Section 307(b) do not admit of any "second class" broadcast citizens. Under Section 307(b), there are only broadcast services that respond to local needs and services that do not.

The Commission itself has previously acknowledged as much. In deciding what is perhaps the most import Section 307(b) question of all -- whether a group of people is without *any* broadcast service (the "white area" concept), the Commission has treated low power television and translator service as the functional equivalent of full power television service. *E.g., KTOV, Inc.*, 57 Rad. Reg. (P&F) 2d 648, 649-50 (1984). In doing this, the Commission observed:

> [T]ranslators or low power television, although by nature secondary services, may represent the most realistic option for providing service to these [unserved] areas.

Id. at 650.

If low power television service is good enough to substitute for full power service when it comes to the most important of all Section 307(b) objectives -- providing local broadcast service to people otherwise entirely without it -- low power service is also good enough to be the equal of full power service *in any Section 307(b) context there is.*

Beyond this, common sense alone indicates that low power service is *no different* than full power service for any purpose that has value under Section 307(b). Section 307(b) is concerned with local viewers -- with whether or not their needs are being met. Local viewers *do not care* whether they are seeing the programs they need on a "primary" station or a "secondary" one.

If the children of Chicago and Milwaukee are deprived of the local educational programming W23AT and W65BT provide today, it will be no sufficient answer to tell them "it was only a 'secondary' service."

If the two million members of minority and ethnic groups served by the special programming of W23AT and W65BT are deprived of this programming that speaks, in their native languages, to their unique local community needs (needs that, for the most part, would be entirely unserved without these low power stations), it will be no sufficient answer to tell them "it was only a 'secondary' service."

If the one hundred thousand Hispanics of Milwaukee can no longer receive their only Spanish language broadcast service, it will be no sufficient answer to tell them "it was only a 'secondary' service."

And if the people of South Bend, Indiana, can no longer receive any ABC Network programming, it will be no sufficient answer to tell them "it was only a 'secondary' service."

It does not matter, the "power." The label "secondary" is meaningless to Section 307(b).[10/] What matters to Section 307(b) *is the service*. It is *the service,* not its "power" or regulatory trappings, that matters *to the people who need the service*. For that reason, it is the service that matters also to Section 307(b):

[10/] As discussed (see pp. 6-8, *supra*), Section 307(b) places a very high value on the preservation of existing broadcast service, because viewers come to rely on such service. The very idea of a "secondary" broadcast service is at odds with this Section 307(b) principle, because it disregards entirely the important public reliance value that inheres in established broadcast service.

In this regard, the Community Broadcasters Association has noted in its Comments (at 3-4) several factors that would discourage any reliance on the action in *Polar Broadcasting, Inc. v. FCC*, No. 92-1597 (D.C. Cir., Mar. 24, 1994) (*per curiam*) (memorandum of unpublished action noted at 22 F.3d 1184). To the CBA's comments Weigel would add that the court's one-page, unpublished *per curiam* opinion explains nothing about the specific issues presented for review and nothing about the reasoning by which the court determined to deny review. The opinion *does* state, however, that it is an "unpublished disposition -- not to be cited as precedent. See Local Rule 11(c)." *See* 1994 U.S. App. LEXIS 5614. From this it is apparent that the court's action in *Polar Broadcasting* has no more precedential force of law than a rumor.

> [It is argued that one should] assign each station one factor in direct proportion to its power. That could not be accurate evaluation, in our view. For, to the people in the immediate community, one power is of like value as another, so long as it renders primary service. [*Easton Pub. Co. v. FCC*, 175 F.2d at 349.]

The Section 307(b) Choice Need Not Be "All or Nothing"

The foregoing analysis is predicated on the hypothetical assumption that destruction of Weigel's low power stations would be necessary under any viable plan for DTV conversion in the markets these stations serve. Even in such a case, the analysis indicates, destruction of this existing, locally-responsive broadcast service cannot be justified, under Section 307(b), by a record that offers only the countervailing "benefit" of speculative DTV "service gains" that could well, for all the record reveals, have no public interest value whatever under Section 307(b).

Fortunately, the Commission need *not* destroy the existing broadcast service of Weigel's stations and others like them to bring about a conversion to digital television. Weigel (among other parties) has submitted technical proposals that will, if adopted, help to insure that DTV conversion does not destroy valuable existing low power broadcast service.[11/] The Community Broadcasters Association, in particular, has submitted detailed technical proposals -- which Weigel fully supports -- that would, if adopted, go far toward insuring that the valuable broadcast service now provided by Weigel's low powers stations and others like them will not be senselessly (and illegally) targeted for destruction by the Commission's DTV conversion plans.[12/] These proposals, which would not

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11/ See Weigel's November 27, 1996 Comments at 19 & Exhibit 30 (Engineering Statement of du Treil, Lundin & Rackley).

12/ See November 22, 1996 Comments of the Community Broadcasters Association in MM Docket No. 87-268.

impede in any material fashion the goals DTV conversion seeks to achieve, should be adopted. If they are, it will probably be a rare case in which DTV conversion threatens destruction of valuable existing low power broadcast service. And for any such case that *does* arise, the Commission must also see to it that a "safety valve" procedure is available, so that existing low power broadcast service will not be destroyed without warrant, based on a public interest comparison of local needs for existing and proposed service, as is required by Section 307(b).

If the Commission takes this recommended course, the important values of Section 307(b) will be respected and advanced. Existing valuable local low power broadcast service will be preserved. And such advantages as may arise from a conversion to DTV will be achieved.

But if the Commission does *not* take this course, if it goes forward with its current DTV conversion plan and the consequent wholesale destruction of existing low power broadcast service that would result, most of the benefits thought likely to be derived from DTV conversion will be delayed or lost altogether, due to reversal on appeal -- a fate that almost certainly awaits any action so needlessly hostile to the basic public interest principles of the Act.

Conclusion

In interpreting and applying Section 307(b)'s broadcast allocations principles, "[t]he discretion which the Commission is directed to exercise is not absolute." *Heitmeyer v. FCC*, 95 F.2d 91, 100 (D.C. Cir. 1937). The Commission is not free to ignore what for more than half a century have been central statutory tenets of broadcast allocations policy.

An enamourment with futurism and the promise of digital technology may have its place, but unchecked it could prove a fatal attraction in this proceeding. Such things provide no justification, under the Act, for abandoning the values of localism and existing broadcast public service that have

guided this nation's broadcast system since the 1934 Act was adopted, and that have done the job well enough to remain, more than sixty years later, still at the heart of Section 307(b)'s continuing mandate for broadcast allocations policy in the twenty-first century.

The Commission cannot build a bridge to the future and throw low power television off the middle of it. Section 307(b) will not permit this.

Respectfully submitted

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